Filed 10/2/02 Bennett v. French CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARGARET BENNETT, et al., Plaintiffs and Appellants, v. TOM FRENCH, et al., Defendants and Respondents.	D037862 (Super. Ct. No. GIC749677)

APPEAL from judgment of the Superior Court of San Diego County, Linda B. Quinn, Judge. Affirmed.

In this action for damages based on alleged violations of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.),[1] plaintiffs Margaret Bennett and Kathleen Shirley sued their former employer, the Escondido

1 All statutory references are to this code unless otherwise stated.

Unified School District (the District) and a number of individual defendants who were affiliated with the District either as managerial/supervisorial employees or as school board members. Both plaintiffs Bennett's and Shirley's main allegations arise out of alleged sexual harassment of Shirley by the District's then-school superintendent, Nicolas Retana, and out of Bennett's resulting efforts as a District human resources officer to complain to District authorities about this sexual harassment. Subsidiary related claims are also made about retaliatory acts by these individual defendants (managerial/ supervisorial employees or school board members) allegedly taken against the plaintiffs for their protected activities. It is these latter claims which give rise to the issues before us, concerning successful demurrers to the first amended complaint of plaintiffs and appellants Bennett and Shirley (collectively plaintiffs), brought by the two sets of individual defendants and respondents subject to these related claims: First, the school board members, defendants Joan Gardner and Debbie Stauffer,[2] and second, the four supervisory coworkers at the District, defendants Tom French, Lori Foster, Marta Baker, and Michelle Moreno (referred to here as the coworker defendants.)

These two sets of demurrers, all sustained without leave to amend, argued a variety of claims, including the plaintiffs' failure to exhaust administrative remedies, inconsistent amendments of pleadings, governmental immunity for discretionary acts (§ 820.2), and insufficient facts to constitute the causes of action based on any alleged

---

[2] We note that another defendant board member, Mark Wyland, was dismissed from the case and is not involved in this appeal. We refer to Gardner and Stauffer as the Board members.

supervisorial relationship between plaintiffs and defendants. (Code Civ. Proc., § 430.10, subd. (e).)

Plaintiffs challenge the dismissals on demurrer, contending there are no procedural bars to the conspiracy claims, the amended complaint is not inconsistent regarding agency allegations and conspiracy, and individual liability for aiding and abetting an unlawful employment practice was properly alleged due to the general supervisory status of the individual defendants. (§ 12940, subds. (h), (i).) We affirm, finding neither of these causes of action falls within the FEHA scope of coverage for personal liability of individual public employees.

FACTUAL AND PROCEDURAL BACKGROUND

Taking as true the allegations of the first amended complaint: During the relevant 1997 through 1999 period, plaintiff Bennett was employed as a District Assistant Superintendent for Human Resources, and plaintiff Shirley was employed as a District Educational Technology Coordinator. Beginning in 1997, the plaintiffs allege former District Superintendent Retana sexually harassed plaintiff Shirley during various times of her employment, on the job, which was unwanted behavior. Shirley complained to him without success. Shirley then told Bennett about the sexual harassment and other objectionable sexual behavior on Retana's part, which led Bennett to make a formal complaint to the District school board by letter in June 1999. The Board hired an independent investigator who rejected the claims.

Thereafter, Retana engaged in retaliatory behavior by criticizing and embarrassing both Bennett and Shirley in front of other employees, and by removing their job functions

from them and giving them to others, such as the coworker defendants. These coworker defendants allegedly assisted in this retaliatory behavior.

On January 20, 2000, plaintiffs filed their Department of Fair Employment and Housing (DFEH) complaints, alleging that they had been subjected to harassment and a hostile work environment by Retana, and had been retaliated against in a number of different ways. Right to sue letters were issued.

On April 6, 2000, plaintiffs filed governmental tort claims with the District, repeating the allegations of the FEHA complaints and giving more detail of the plaintiffs' exclusion from their job functions and ongoing inappropriate sexual behavior by Retana in the workplace. These government claims were rejected by the District, specifically by individual defendant French in his capacity as Assistant Superintendent for Business Services.

On June 12, 2000, plaintiffs filed this superior court action. The original complaint alleged a number of FEHA causes of action against the District and Retana, and also against the coworker defendants and the Board members, conspiracy and aiding and abetting in violation of the FEHA. (§§ 12948, 12940, subds. (h), (i).) It was generally alleged that the defendants were agents and coconspirators with each other.

Demurrers were sustained with leave to amend. In their first amended complaint, the operative pleading, plaintiffs alleged against these individual defendants as cause of action eight, conspiracy, and cause of action nine, aiding and abetting in violation of the FEHA.

In general, the first amended complaint's allegations about the defendant Board members are that Stauffer pledged her loyalty to Retana, gave Bennett inconsistent orders about a calendar matter, met with other employees instead of Bennett, and otherwise conspired with Retana and other individual defendants to retaliate against Bennett. As against Board member Gardner, it is alleged she was another Retana loyalist, who conspired with Retana to retaliate against and harass Bennett for complaining about Retana's unlawful acts, and who confronted Bennett in a hostile manner about an anonymous letter the Board received complaining about Retana's behavior.

With respect to the coworker defendants, the first amended complaint's allegations are that Marta Baker participated in sexual activity during business hours with Retana, pledged her loyalty to him and helped him retaliate against plaintiffs. Baker had the objective of replacing Bennett in her position.

With respect to defendant Lori Foster, she was Shirley's supervisor and a strong Retana loyalist, who sided with him and conspired with him to retaliate against plaintiffs for her own individual advantage. Foster allegedly used her position of authority over Shirley to retaliate against her and destroy or harm her career, eventually forcing Shirley out of the office to an "on loan" position with another agency. Foster also assisted in excluding Bennett from her job duties and responsibilities.

Defendant Tom French was another Retana loyalist who allegedly worked with Retana, Foster and Baker to take away Bennett's job functions and to replace her. Defendant Michelle Moreno was hired by Retana as his communications officer, took a pledge of loyalty to him, and assisted him in retaliating against Bennett for having

complained to the Board about Retana's sexual harassment of women employees in the District. For example, Moreno allegedly set Bennett up to meet the press when her allegations became public, while assisting defendant Baker to avoid the press.

General demurrers were brought by the individual Board member defendants and the coworker defendants. These were sustained without leave to amend. As to the defendant Board members, the ruling as to cause of action eight, conspiracy, was: (1) The government tort claims contained no facts that charged the Board members as conspirators with each other or with the other defendants, and there were no facts pleaded regarding compliance with the tort claims act or an excuse for noncompliance; (2) the Board members were immune for the alleged wrongful conduct pursuant to section 820.2, applicable to discretionary acts, and plaintiffs had not factually pleaded around the immunity, since basic policy making decisions of elected school board members were alleged.

As to the defendant Board members, the ruling as to cause of action nine, aiding and abetting in violation of the FEHA, was: (1) plaintiffs failed to allege sufficient facts the demurring defendants were plaintiffs' supervisors, in light of the agency allegations in the original complaint, as contrasted with paragraph 6 of first amended complaint (the individual defendants are supervisors of plaintiffs), such that this allegation was a legal conclusion which was inconsistent with the original complaint, without a satisfactory explanation for the inconsistency; (2) also, section 820.2 immunity again applied.

Next, as to the coworker defendants, the general demurrers were also sustained without leave to amend. As to cause of action eight, conspiracy, the court ruled: (1) The

tort claims were insufficient, containing no facts charging the coworker defendants as conspirators with each other or with the other defendants; there were no facts pleaded regarding compliance with the tort claims act or an excuse for noncompliance; (2) plaintiffs had not pleaded around the governmental immunity identified in the previous set of demurrers (§ 820.8, no individual public employee liability for acts and omissions of others).

As to the coworker defendants' demurrer to cause of action nine, aiding and abetting in violation of the FEHA, the ruling was:

> "[1] With the exception of defendant Foster who is alleged to be plaintiff Shirley's supervisor [citation], the cause of action fails to factually allege that the demurring defendants were plaintiffs' supervisors. [Citation.] As for the defendant Foster-plaintiff Shirley supervisor relationship, there are no facts in the first amended complaint that defendant Foster had the power to hire and fire plaintiff Shirley. [Citation.] Also, with the exception of the defendant Foster-plaintiff Shirley supervisory relationship, the court disregards the allegation in paragraph 6 of the first amended complaint that the demurring defendants are plaintiffs' supervisors, see paragraph 6 of first amended complaint. The allegation in paragraph 6 of the first amended complaint is a legal conclusion and is inconsistent with the complaint, see, complaint, paragraph 4, without a satisfactory explanation for the inconsistency. [Citations.] [2] To the extent that the cause of action relies on mere inaction in an effort to plead aiding and abetting liability, the cause of action fails to allege facts in that regard. [Citation.] To the extent that the cause of action attempts to allege conduct attributable to the demurring defendants, the cause of action shows that they did nothing more than follow the directions of their supervisor, defendant Retana."

This ruling also included a grant of judicial notice of plaintiff Bennett's interrogatory responses that identified her supervisor as individual defendant Retana.

Judicial notice was denied of amended interrogatory responses which stated instead that she had more than one supervisor.

Plaintiffs appeal.

DISCUSSION

I

INTRODUCTION; FEHA POLICIES

On review of a ruling on demurrer, we consider that all material facts properly pleaded are admitted, "but not contentions, deductions or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Ibid*.)

On plaintiffs' appeal of the demurrer rulings and judgments, the parties argue four main issues concerning the two sets of individual defendants and the conspiracy and aiding and abetting claims: First, did the plaintiffs fail to exhaust their administrative remedies? In any case, does governmental immunity for discretionary acts (§ 820.2), bar the contentions as to the individual Board member defendants?

Next, was the amendment of the pleadings that (1) discarded the original agency allegations (i.e., that defendants were agents of each other and the District), and (2) added the supervisory allegations, a sham amendment, so as to justify a finding of inconsistent amendment of pleadings that undermined either or both of the conspiracy and aiding and abetting claims? Finally, did the plaintiffs plead insufficient facts to constitute their causes of action based on any alleged supervisorial relationship between plaintiffs and defendants? While one such defendant, Lori Foster, was alleged to be directly in charge of supervising the duties of one of these plaintiffs (Shirley), the other defendants were identified as high-ranking supervisors of other employees, but not of plaintiffs. Also, as the trial court noted, there are no facts alleged in the first amended complaint that Foster, a midlevel District employee, had the power to hire or fire plaintiff Shirley.

Before we discuss the manner in which each of these claims must be resolved, we first outline basic FEHA interpretation principles. Plaintiffs' claims against these individual defendants are brought under section 12940, as relevant here, which declares it shall be an unlawful employment practice:

> "(h) For any employer, labor organization, employment agency, *or person* to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part. [¶] (i) *For any person to aid, abet*, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so." (Italics added; these subdivisions were formerly lettered (f) & (g).)

As against the District and Retana, plaintiffs' sexual harassment claims fall under section 12940, subdivision (j)(1), which makes it an unlawful practice for an employer

etc., or any other person, to harass an employee, etc., on designated bases, such as sex. The discrimination language of section 12940, subdivision (h) has been held to be equivalent to retaliation when conducted by a person. (*Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 1211 (*Page*).)

In *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 1136-1137 (*Carrisales*), the Supreme Court held that FEHA's "primary concern" is to remedy unlawful employment practices, as opposed to imposing personal liability on individual employees. Generally, as of 1999, the FEHA did not cover harassment short of an unlawful employment practice, although the court cautioned that one should not conclude from FEHA noncoverage of certain conduct that anyone, such as a coworker, would be immunized from the consequences of conduct that is otherwise tortious. (*Ibid*.) Rather, although current section 12940(j)(1) (formerly section 12940(h)(1)) prohibits any "person" from harassing an employee, it was intended to impose "on the employer the duty to take all reasonable steps to prevent this harassment from occurring in the first place and to take immediate and appropriate action when it is or should be aware of the conduct." (*Carrisales, supra,* 21 Cal.4th at p. 1140.)[3]

From these statements, and the nature of the allegations made about the events which occurred in this workplace, we believe it is appropriate to view the issues

---

3 In 2001, in response to *Carrisales*, the Legislature added section 12940, subdivision (j)(3), to provide for personal liability of employees for harassment that he or she perpetrates. We think the fact this subdivision had to be added shows that the Supreme Court's general view as expressed in *Carrisales* was correct, that the FEHA's

presented in this light. Even though section 12940, subdivision (h) speaks in terms of it being an unlawful employment practice for, inter alia, a *person* to discriminate against any person because the person opposed any unlawful practices, or filed a complaint in any FEHA proceedings, and subdivision (i) states it is an unlawful employment practice for any *person* to aid and abet the doing of any such unlawful practices, the statutory scheme and the case law indicate that to evaluate a pleading for compliance with FEHA principles, one must still look to the workplace context and hierarchy in which the person carried out the alleged acts: as a nonsupervisory coworker, a participating supervisor, a nonharassing supervisor, etc. (*Page, supra,* 31 Cal.App.4th at p. 1210; *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318 (*Fiol*).) The FEHA's primary concern is with remedying unlawful employment practices, with only a secondary goal of imposing personal liability for statutory or related torts. (See *Carrisales, supra*, 21 Cal.4th at p. 1140.) Our statutory analysis of section 12940, subdivisions (h) and (i) must take these legislative goals into account.

This brings us to the question, to what extent have these plaintiffs successfully alleged these individual defendants are liable for conspiracy and/or aiding and abetting an unlawful practice, in light of the defendants' individual degrees of work or personal connection to the plaintiffs, general or specific, within the meaning of FEHA?

"primary concern" is to remedy unlawful employment practices, as opposed to imposing personal liability on individual employees.

II

BASIS OF CONSPIRACY/AIDING AND ABETTING THEORIES;

EFFECT OF AGENCY PLEADING

Before we reach the FEHA statutory interpretation issues, we first address several threshold issues regarding exhaustion of administrative remedies and also the claim of inconsistent amendment of pleadings. This is necessary to better understand the relationship of these claims against these individual defendants, Board members and coworkers, with the claims against the chief defendants, the District employer and former superintendent Retana.

Although the claims of aiding and abetting and a claim of conspiracy are similar, there is a distinction. The concept of aiding and abetting involves two separate persons, one helping the other. (*Janken v. GM Hughes Electriconics* (1996) 46 Cal.App.4th 55, 77-78 (*Janken*).) Also: "Conspiracy is a concept closely allied with aiding and abetting. A conspiracy generally requires agreement plus an overt act causing damage. [Citation.] Aiding and abetting requires not agreement, but simply assistance. The common basis for liability for both conspiracy and aiding and abetting, however, is concerted wrongful action. [Citation.]" (*Ibid*.)

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the

torts of other coconspirators within the ambit of the conspiracy. [Citation.]" (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.)

A

Exhaustion of Remedies

We first note that plaintiffs have alternatively characterized their conspiracy cause of action as a FEHA-based one under section 12948, conspiracy to violate the rights guaranteed by the Unruh Civil Rights Act (Civ. Code, § 51 et seq.),[4] or as a common law conspiracy cause of action. However, we view the conspiracy claim as inextricably related to the other FEHA claims. With respect to the alleged conspiracy, plaintiffs allege as the underlying substantive cause of action (or the "activating tort") that there was FEHA-forbidden retaliation for plaintiffs' complaints of sexual harassment. (§ 12940, subd. (h).) We therefore reject the plaintiffs' claim that only common law conspiracy is at issue here, such that no individualized tort or FEHA claims had to be filed, referencing the individual defendants. Both types of claims were made to the District, both naming Retana as an individual District employee whose acts gave rise to a portion of the alleged liability. Also, Bennett's FEHA claim mentioned Stauffer, a Board member.

The government tort claims made further allegations, with both plaintiffs also naming coworker defendants Baker and Foster as involved in these transactions by taking

---

4 "It is an unlawful practice under this part for a person to deny or to aid, incite, or conspire in the denial of the rights created by Section 51, 51.5, 51.7, 54, 54.1, or 54.2 of the Civil Code." (§ 12948.)

their job functions or by participating in joint employment activities, to the detriment of the plaintiffs. In addition, Bennett's claim names French and Moreno for the same alleged acts. The tort claims further allege there was negligent supervision, retention, and/or hiring of both Retana and other district employees.

Both these FEHA administrative claims and the government tort claims served a similar function of placing the District on notice of personnel problems warranting investigation. (*Garcia v. Los Angeles Unified School Dist.* (1985) 173 Cal.App.3d 701, 712.)[5] However, the defendants claim there was inadequate claims compliance for either of the causes of action, because the legal or factual theories of conspiracy and aiding and abetting were not mentioned. Plaintiffs respond that the claims were adequate for this type of related/subsidiary cause of action.[6]

The general rule is that "plaintiffs may not include causes of action in their complaints that have not been fairly reflected in the written claim submitted to public entities." (*Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, 276.) Also, where there are apparent differences between the complaint and the governmental claim, but they are "merely the result of a plaintiff's addition of factual

---

5 Section 910 provides: "A claim shall be presented by the claimant or by a person acting on his or her behalf and shall show all of the following: . . . [¶] (e) The name or names of the public employee or employees causing the injury, damage, or loss, if known."

6 In *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, the rule is explained that claims made in a civil action must be "like or reasonably related to" the original administrative DFEH charges, such that they would reasonably have been

details or additional causes of action," a variance in pleading will not be found to be fatal, where the basic facts were set out in the claim, and there was no "'complete shift in allegations.'" (*Id.* at p. 277.) These claims were quite broad in scope and we decline to engage in a hypertechnical reading of the first amended complaint. For our purposes here, we will assume that there was adequate claims compliance.

B

Inconsistent Amendment of Pleadings

Another preliminary issue that will frame the dispositive arguments for us is whether the defendants are correct that the amendment to the complaint that dropped the agency allegations and added the allegation that all the individual defendants were supervisors of the plaintiffs, within the meaning of FEHA, constituted a sham amendment. The rule is that "a plaintiff may not discard factual allegations of a prior complaint, or avoid them by contradictory averments, in a superseding, amended pleading." (*California Dental Assn. v. California Dental Hygienists' Assn.* (1990) 222 Cal.App.3d 49, 53, fn. 1.) Although generally, in reviewing dismissals after demurrers, an appellate court will assume the truth of the factual allegations of the complaint, "an exception exists where a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citation.] In these circumstances, the policy against sham pleading permits the court to take judicial notice

---

uncovered and investigated in connection with the charges that the employee did make. (*Id*. at pp. 1615-1617.)

of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint." (*Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 383-384.)

Here, due to the amendment of the original complaint to state that each of the individual defendants was a supervisor of the plaintiffs, the plaintiffs' theory on appeal is that these individual defendants acted solely in concert with each other and the additional individual defendant Retana, rather than with or as agents for their corporate/principal employer, the District. There are two problems with this approach. First, it disregards the principle that "'[a]gents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage. [Citations.]'" (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 45.) This concept is further explained in *Janken, supra,* 46 Cal.App.4th at page 78:

> "A corporate employee cannot conspire with his or her corporate employer; that would be tantamount to a person conspiring with himself. Thus when a corporate employee acts in his or her authorized capacity on behalf of his or her corporate employer, there can be no claim of conspiracy between the corporate employer and the corporate employee. [Citations.] In such a circumstance, the element of concert is missing."

Under section 12940, subdivision (j)(4)(A), the term "employer" is defined (for purposes of subdivision (j) only, which prohibits harassment by an employer, etc., or "any other person") as meaning "any person regularly employing one or more persons . . . , or any person acting as an agent of an employer . . . ." The court in *Janken,*

supra, 46 Cal.App.4th 55, relied on that section as showing that any person acting as an agent of the employer is an employer for purposes of FEHA, to the extent that vicarious liability of the employer for acts of its supervisory employees that constitute violations of FEHA must be imposed. (*Id.* at pp. 65-66.) The court rejected an alternative approach to interpreting that language, that supervisory employees may be personally liable as equivalent to employers. (*Ibid*.) We think this analysis leads to the conclusion that the agency allegations made in this original complaint are indivisible from plaintiffs' current attempt to hold the Board members and coworker employees personally liable for harassment and retaliation.

Accordingly, this inconsistent amendment of pleadings to delete agency allegations of the various defendants for each other, including their employer the District, should be disregarded, because the initial agency allegation is contrary to the subsequent allegations of concerted action among the individual defendants as supervisors of the plaintiff fellow employees, outside the scope of their employment. Plaintiffs cannot avoid this conclusion by claiming that Retana was the main tortfeasor, and they did not mean to include the District as a coconspirator, so that the prior agency allegations are immaterial.

Moreover, the allegation in the first amended complaint, "[t]hese individual defendants were plaintiffs' supervisors within the meaning of FEHA," is merely a legal conclusion, as opposed to the pleading of ultimate facts.

The next problem with the plaintiffs' approach is their current attempt to allege only actionable conduct by the defendants that was outside the scope of employment.

The agency rules summarized above ordinarily apply when a corporate employee acts in his or her authorized capacity on behalf of his or her corporate employer. (*Janken, supra,* 46 Cal.App.4th at pp. 77-79.) The Supreme Court in *Reno v. Baird* (1998) 18 Cal.4th 640, 646-647 (*Reno*), adopted the analysis in *Janken* which distinguished between discrimination in the employment context, which is carried out by the employer, and harassment in the employment context, which is personal in nature and is not within the scope of authorized supervisory activities. The Supreme Court gave examples of the personnel management decisions that are carried out by a supervisory employee as an agent of the employer, which included "commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like . . . ." (*Reno, supra,* 18 Cal.4th at pp. 646-647.) These types of management activities do not come within the meaning of harassment, because they "'are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management. This significant distinction underlies the differential treatment of harassment and discrimination in the FEHA.' [Citation.]" (*Reno, supra,* 18 Cal.4th at p. 647.)

Essentially, what plaintiffs are alleging are that the Board members and the coworker defendants all engaged in actions outside the scope of job duties that constituted retaliation and harassment. Their chief target in the pleading is the sexual harassment of Shirley carried out by Retana, and its aftermath, and both the conspiracy and aiding and abetting theories depend upon this central theory about Retana. However, all the alleged activities about the Board members and the coworkers took place within the workplace context of meetings, job assignments, promotions or demotions, performance evaluations and assignment or nonassignment of supervisory functions. (*Reno, supra,* 18 Cal.4th at p. 647.) We do not think that plaintiffs' amendment to add the supervisory allegations somehow defeats the previous agency allegations, that the Board members and coworker defendants were acting within their job capacities when they interacted, even adversely, with plaintiffs. The allegations about attitudinal pledges of loyalty to the superintendent add nothing, because it is the alleged actions that we must evaluate in context and compare it to the statutory language.

These conclusions about the contrasting agency theories in the pleadings do not resolve all the issues, however, because plaintiffs continue to contend that FEHA promotes individual liability under certain circumstances, involving actions outside of a person's official capacity, in concert with others, as will next be discussed.

III

DISPOSITIVE ISSUES: SCHOOL BOARD MEMBERS

Section 820.2 provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or

omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." We inquire whether this statute applies to both the conspiracy and aiding and abetting claims regarding the Board member defendants.

In *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 976 (*Caldwell*), the Supreme Court explained the scope of the "discretionary act" immunity afforded to a public employee under section 820.2, when the act or omission for which recovery is sought resulted from "the exercise of the discretion vested in him." The court held such immunity from suit extends to "'basic' governmental policy decisions entrusted to broad official judgment." (*Ibid*.) The court found that such immunity must apply to the decision of an elected school board whether to replace a school district's highest appointed official, because of the policies promoting "the board's free, open, and candid consideration of an issue of this magnitude," which "should not be subject to judicial interference by means of lawsuits seeking to hold individual board members accountable for their motives. As a matter of law, participating board members therefore enjoy personal immunity under section 820.2. This immunity applies even where the dismissed official alleges that the members' votes were cast for reasons that violated FEHA." (*Id.* at p. 976.)

The Supreme Court further explained that although FEHA generally prohibits employment discrimination by both public and private employers (in some cases also by public employees, as individual "agents" or "aiders and abetters" of culpable employers), "FEHA contains no indicia of an additional intent that individual public officials or employees may be sued despite a specific statutory immunity that would otherwise apply in a particular case. Hence, FEHA does not abrogate section 820.2's specific grant of

immunity to public employees for their discretionary acts." (*Caldwell, supra*, 10 Cal.4th 972, 986.) The rule is that such "discretionary acts" are not entitled to immunity solely because the subject employee's general course of duties is discretionary, but instead, a showing must be made that the specific conduct that led to the plaintiff's claims involved an actual exercise of discretion, "i.e., a "'[conscious] balancing [of] risks and advantages'" [citation]." (*Caldwell, supra*, 10 Cal.4th at p. 983.) However, the Supreme Court cautioned, this type of standard "does not require a strictly careful, thorough, formal, or correct evaluation. Such a standard would swallow an immunity designed to protect against claims of carelessness, malice, bad judgment, or abuse of discretion in the formulation of policy." (*Id*. at pp. 983-984.)

In the case before us, the allegations about the defendant Board members are that Stauffer pledged her loyalty to Retana, gave Bennett inconsistent orders about a calendar matter, met with other employees instead of Bennett, and otherwise conspired with Retana and other individual defendants to retaliate against Bennett. As against Board member Gardner, it is alleged she was another Retana loyalist, who conspired with Retana to retaliate against and harass Bennett for complaining about Retana's unlawful acts, and confronted Bennett in a hostile manner about an anonymous letter the Board received complaining about Retana's behavior.

We disagree with plaintiffs' argument that this conduct did not involve any basic policy-making function, but rather represented only individualized harmful conduct. These were essentially personnel issues at the higher management level, generally within the executive or administrative authority of the Board members. (See *Caldwell, supra,*

10 Cal.4th at p. 983, fn. 5.) All these allegations pertain to the Board members' personal interaction with district staff on district-related business, despite the plaintiffs' efforts to cast the activities in a purely personal light. For pleadings purposes, we are unable to distinguish this type of alleged conduct from the personnel decisions held to fall under the discretionary immunity of section 820.2 for elected school board members who are charged with leadership roles in the school district.

Accordingly, even though plaintiffs are alleging that the Board members acted for personal motives of misplaced loyalty and potential harassment, which could be arguable violations of FEHA, they have not pled the Board members' actions fell outside the scope of section 820.2. The demurrers to both of these causes of action were correctly sustained on this ground, as well as on the theory that the first amended complaint was fatally inconsistent with the original pleading with respect to the agency allegations (see pt. IIB, *ante*).

IV

DISPOSITIVE ISSUES: REMAINING COWORKER DEFENDANTS

Again, we reiterate that plaintiffs' current allegations that all the individual defendants were their supervisors within the meaning of FEHA is inconsistent with the prior agency theory alleged in the original complaint, and we cannot take as true this allegation of supervisory status for purposes of reviewing the ruling on the demurrers as

to the coworker defendants.[7] However, we proceed to review this ruling regarding the separate conspiracy and aiding and abetting causes of action against the coworkers in order to address plaintiffs' further challenges to the ruling, on statutory grounds.[8]

The plaintiffs' chief argument for imposing individual liability on the coworker defendants is based upon section 12940, subdivision (i), since that section provides it is an unlawful practice, "[f]or any *person* to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under this part, or to attempt to do so." (*Ibid.,* italics added.) To a lesser extent, plaintiffs continue to rely on their conspiracy theory, that section 12940, subdivision (h) allows for personal liability on the coworkers' part for retaliatory activities, since that section provides it is an unlawful practice "[f]or any employer . . . *or person* to . . . discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." (*Ibid.;* italics added.)[9]

---

7 This ruling also included a grant of judicial notice of plaintiff Bennett's interrogatory responses that identified her supervisor as individual defendant Retana. Judicial notice was denied of amended interrogatory responses restating that she had more than one supervisor. Plaintiffs contend this ruling was error and an abuse of discretion. However, we need not resolve factual disputes in this review of the ruling on demurrers, and can address the statutory definitions in FEHA without considering the rulings on judicial notice of these interrogatory responses.

8 Plaintiffs do not seriously argue they successfully pled around the governmental immunity previously identified in the previous set of demurrers as to the coworker defendants (§ 820.8, no public individual employee liability for acts and omissions of others). As to the coworker defendants, other issues are dispositive, as we now discuss.

9 Although plaintiffs mainly argue on appeal that the conspiracy cause of action is not barred due to lack of compliance with administrative claims procedure, they also

Both of these theories of liability are fundamentally based upon the alleged actions of defendant Retana, with whom the coworker defendants allegedly fell in line, conspired with, or aided and abetted in his alleged FEHA violations. Plaintiffs base their appellate contentions against the coworker defendants mainly on this summary of the applicable rules as given in *Fiol, supra,* 50 Cal.App.4th 1318, 1331:

> "It is an unlawful employment practice for a supervisor to sexually harass an employee. If a supervisor sexually harasses an employee, the harassing supervisor is personally liable for money damages and the employer is vicariously and strictly liable for the harassment. *If a supervisor aids and abets sexual harassment of an employee, the supervisor is personally liable for money damages.* A supervisor who, without more, fails to take action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer. [¶] A supervisor does not aid and abet a harasser by mere inaction. A supervisor does not aid and abet the employer by acts constituting personnel management decisions. The 'agent of an employer' language in section 12940, subdivision (h)(3)(A) does not impose personal liability on a non-harassing supervisor, but rather imposes on the employer vicarious liability for the supervisor's acts." (Italics added.)

It should be noted that the term "supervisor" is not a statutory term used in section 12940, subdivisions (h) and (i); however, the term was added to subdivision (j) of that section apparently in response to *Carrisales, supra,* 21 Cal.4th 1132. (See fn. 3, *ante*.)[10]

---

appear to argue the conspiracy cause of action is proper on the merits as to the coworkers. The aiding and abetting claim incorporates the conspiracy allegations. Accordingly, we deem it necessary to address this further statutory interpretation question as to both causes of action.

10 Section 12926, subdivision (r) provides: "'Supervisor' means any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend

Instead we must focus on the term "person" as used in section 12940, subdivisions (h) and (i), for purposes of determining the type of supervisor allegations that are required here. Plaintiffs summarize their various arguments, primarily based upon *Matthews v. Superior Court* (1995) 34 Cal.App.4th 598, 599-600, as: "To the extent none of the defendants are deemed (or later found to be) 'supervisors' (plaintiffs allege they are), they are still personally liable for common law conspiracy, i.e., conspiring with Retana (not the district) to retaliate and harass plaintiffs. No supervisory status is required for common law conspiracy as it is for FEHA 'aiding and abetting.' Defendants' supervisory status alone is sufficient to trigger personal liability under FEHA. They need not be plaintiffs' immediate supervisors."[11]

---

that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

[11] As noted, we have already rejected the plaintiffs' theory that there is a common law conspiracy theory available here, exclusive of FEHA. (Pt. IIA, *ante*.)

In *Matthews v. Superior Court, supra,* 34 Cal.App.4th 598, the court held that certain defendants, both direct (personal) supervisors and superior supervisory personnel (e.g., a medical director of an emergency medicine center and the center's administrative director) who were aware of, and at times participated in, the unlawful conduct, are "persons" subject to personal liability for sexual harassment under the FEHA. The court relied on language from Fair Employment and Housing Commission decisions which held in harassment cases "that individuals with authority to hire and fire or to control the conditions of employment, who either participate in the unlawful conduct, tacitly approve of the improper action, fail to take action upon learning of the discriminatory conduct, or participate in the decisionmaking process which is the basis of the discriminatory condition, are personally liable under the FEHA as agents of the employer. In determining whether an individual acted as an agent of the employer, the commission has looked 'to the degree an entity or person significantly affects access to employment' and has held personally liable as agents of an employer '[individuals] *having supervisory status who either themselves did the wrongful act or participated in the decision-making process which formed the basis of the discriminatory condition*.' [Citation.]" (*Id.* at p. 604; italics added.)

Further, plaintiffs argue that the defendants' status alone as supervisors is sufficient to hold them personally liable for FEHA aiding and abetting Retana in harassing and retaliating against plaintiffs.

In considering the aiding and abetting liability of a person under section 12940, subdivision (i), the statements in *Fiol, supra,* 50 Cal.App.4th 1318, must be read in light of its statement of the rule that "the FEHA provides that an employer is strictly liable for the harassment of an employee by an agent or supervisor, while the employer is only liable for harassment of an employee *by nonagents or nonsupervisors* if the employer, its agents or supervisors know or should know of the harassing conduct and the employer fails to take immediate and appropriate corrective action. [Citation.]" (*Id.* at p. 1328, italics added.)

Also in *Fiol, supra*, 50 Cal.App.4th 1318, the court referred to the decision in *Janken, supra,* 46 Cal.App.4th 55, as stating that "'it was the intent of the Legislature to place individual supervisory employees at risk of personal liability for personal conduct constituting harassment, but that it was not the intent of the Legislature to place individual supervisory employees at risk of personal liability for personnel management decisions later considered to be discriminatory. We conclude that the Legislature's differential treatment of harassment and discrimination is based on the fundamental distinction between harassment as a type of conduct not necessary to a supervisor's job performance, as contrasted with business or personnel management decisions -which might later be considered discriminatory-as inherently necessary to performance of a supervisor's job.' [Citation.] While the *Janken* court considered the distinction between

harassment and discrimination, its analysis is equally relevant to the distinction between harassing and nonharassing supervisors. A nonharassing supervisor who fails to take action on a sexual harassment complaint by a subordinate has not engaged in personal conduct constituting harassment, but rather has made a personnel management decision which in retrospect may be considered to be inadequate or improper." (*Fiol, supra,* 50 Cal.App.4th at pp. 1330-1331.)

Obviously, when considering the scope of personal liability for persons in supervisorial capacities in the workplace under FEHA, the case law has made important distinctions about whether the individual sought to be charged personally participated in the alleged FEHA violations, and what rank the individuals had relative to each other. We believe it is also an equally important consideration whether the person on whom personal liability is sought to be imposed was personally or directly the supervisor of the individual plaintiffs. In other words, the cases acknowledge that there are some supervisors who are harassing and some who are nonharassing. (*Fiol, supra*, 50 Cal.App.4th 1318.) The use of the term supervisor in this context presupposes that the supervisor has the power and the duty to control and affect the plaintiffs' conditions of employment, in a managerial capacity. (See, e.g., the examples given in *Reno, supra,* 18 Cal.4th at pp. 646-647, of managerial activities that are carried out by a supervisor as an agent of an employer.) We believe that the Legislature intended that for purposes of determining who is a "person" under section 12940, the concept of a "supervisor" be narrowly construed for purposes of imposing personal liability for harassment or retaliation. This means here that plaintiffs could only legitimately make such personal

liability claims against such persons who were directly responsible for making the actual, day-to-day decisions about their job duties and performance. Otherwise, it would be the employer who is to be vicariously liable for the bad acts of its agents, such as its managerial or indirectly related supervisorial employees. (*Reno, supra*, 18 Cal.4th at pp. 661-662.) Such a distinction is made in the discrimination context and we think it should be made in the harassment or retaliation context as well, where there is no direct or actual supervisorial relationship alleged between the plaintiff and the individual defendant to be charged. If there is such a direct or actual supervisorial relationship, then the supervisor is ordinarily acting as an agent of the employer, although any sexually harassing conduct is clearly outside the scope of employment. Where there is no such direct or actual supervisorial relationship properly alleged regarding retaliation, it is only appropriate to view the defendant employee who has some supervisory status, but not over the complaining plaintiff, as an agent of the employer, since the supervisorial employee has perforce not stepped outside his or her ordinary job functions, which by definition do not include supervising that particular plaintiff individual.

In this case, only Lori Foster was alleged to have been the personal supervisor of one of the plaintiffs, Shirley. The other coworker defendants held supervisorial status and managerial positions over others, but in effect, they continued to act as agents of the District, their employer, even when they made the alleged retaliatory and harassing acts. We do not think that the plaintiffs have successfully alleged the necessary individual connection between themselves and defendants as their personal supervisors, with the exception of Foster and Shirley. Rather, they have alleged a collateral theory of liability,

either conspiracy or aiding and abetting, that depends upon the direct harassment and retaliation by Retana. From the allegations, it is clear that the coworker defendants' participation in the alleged retaliation was keenly felt by the plaintiffs, but it is still not alleged that these coworker defendants had the managerial power to control their duties. We think that for personal liability to be imposed upon individual supervisors for retaliation and harassment, the Legislature's expectation was that such exposure to liability would be confined to those supervisors and those subordinates who had clear lines of authority connecting them such that the supervisors knew who answered to them, and what the allowable scope of their job duties should be. Supervisorial status alone is not enough.[12]

Even as to Foster and Shirley, we think the plaintiff's pleading is defective on this aiding and abetting theory, because Foster's activities to demonstrate her loyalty to the District's superintendent fall more closely within the definitions of nonliability of a supervisor, as set forth in *Fiol, supra*: "A supervisor who, without more, fails to take

---

12 Plaintiffs have submitted the recent case of *Walrath v. Sprinkel* (2002) 99 Cal.App.4th 1237, 1240-1241, to support their claim that supervisors may be held individually liable for retaliation under FEHA. That case held that claims for retaliation against a person such as a supervisor, brought under section 12940, subdivision (h), in the form of a common law cause of action for retaliation in violation of public policy, do not require the exhaustion of administrative remedies, and are not barred by the authority of *Reno, supra*, 18 Cal.4th 640. We find this case to be factually distinguishable, because those defendants conceded that the individual defendant was the plaintiff's supervisor. Also, a different type of cause of action was alleged, i.e., a common law one for terminating him in retaliation for his complaints against age discrimination in violation of the public policy set forth in the FEHA. (*Id.* at p. 1243.) We are dealing here with statutory causes of action, not involving common law claims of violation of public

action to prevent sexual harassment of an employee is not personally liable as an aider and abettor of the harasser, an aider and abettor of the employer or an agent of the employer. [¶] A supervisor does not aid and abet a harasser by mere inaction. A supervisor does not aid and abet the employer by acts constituting personnel management decisions." (*Fiol, supra,* 15 Cal.App.4th at p. 1331.) Essentially, Shirley alleges that Foster gave her a poor performance evaluation, embarrassed her at meetings and harmed her career. Plaintiffs allege Foster encouraged and supported Retana's actions by word and deed. While we do not condone such alleged conduct, we cannot say as a matter of law that it falls outside the scope of managerial and supervisorial activities in the workplace. Nor can we say it falls within the scope of section 12940, subdivision (i), as aiding and abetting the unlawful activities of others.

For all these reasons, the demurrers were correctly sustained without leave to amend.

---

policy, and there is no concession that the coworker defendants or the Board member defendants were the supervisors of the plaintiffs.

DISPOSITION

Judgments of dismissal affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

McCONNELL, J.